

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 506

UNITED STATES, APPELLANT,

vs.

JERRY BRAVERMAN

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

INDEX

| | Original | Print |
|--|----------|-------|
| Record from the United States District Court for the Southern District of California, Central Division | | |
| Indictment | 2 | 1 |
| Trial Memorandum | 6 | 4 |
| Minute orders | 12 | 8 |
| Argument and plea | 12 | 8 |
| Setting cause for jury trial | 13 | 8 |
| Call of the calendar | 14 | 9 |
| Dismissing the indictment | 15 | 9 |
| Transcript of proceedings on the provisions of the indictment, etc., June 26, 1962 | 16 | 10 |
| Appearances | 17 | 10 |
| Colloquy between court and counsel | 18 | 10 |
| Notice of appeal to the Supreme Court of the United States .. | 46 | 27 |
| Clerk's certificate (omitted in printing) | 52 | 28 |
| Order noting probable jurisdiction | 53 | 28 |

(File endorsement omitted)

2

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

February, 1962 Grand Jury

No. 30912-CD

UNITED STATES OF AMERICA, *Plaintiff*.

v.

JERRY BRAVERMAN, *Defendant*.

Indictment—Filed June 6, 1962

(49 USC 41(1): Unlawful Solicitation of Concession and Rebate Respecting the Transportation of Property in Interstate Commerce).

The Grand Jury charges:

COUNT ONE

(49 USC 41(1))

(1) At all times mentioned in this Indictment, Andrew Jergens Company, a corporation, with its principal office in Cincinnati, Ohio, was and is engaged in the manufacture, distribution, and sales of various and sundry cosmetics and toiletries, and maintains a distribution office and warehouse at Burbank, California; that said Andrew Jergens Company shipped and ships various and sundry of its products from its warehouse at Burbank, California, in interstate commerce utilizing various modes and methods of transportation, including Superior Fast Freight, a freight forwarder; and that defendant JERRY BRAVERMAN was employed by Andrew Jergens Company at Burbank, California, as transportation manager.

(2) Superior Fast Freight, a corporation with its principal office at Seattle, Washington, was and is a freight forwarder subject to the Interstate Commerce Act and the Acts of Congress amendatory thereof and supplemental thereto, and as such freight forwarder had published and filed with the Interstate Commerce Commission tariffs of its rates and charges; and that Rob-

3

ert C. Harmonson was vice president and general manager, and L. E. Hoppy was district sales manager of Superior Fast Freight; and that Marvin Pratt was general sales manager and Eugene Allen was a traffic solicitor of Superior Fast Freight.

(3) During the period of January 23, 1962, to March 6, 1962, Andrew Jergens Company had tendered to Superior Fast Freight at Los Angeles, California, for transportation in interstate commerce various and numerous shipments of freight, including the following specified representative shipments:

(4) **Superior Fast Freight**

Freight Bills No. 20061, dated February 8, 1962
 No. 21379, dated February 13, 1962
 No. 21382, dated February 13, 1962
 No. 23088, dated February 13, 1962

covering the transportation of freight from Burbank, California to points in Oregon and Washington.

(5) On or about January 20, 1962, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant JERRY BRAVERMAN did knowingly solicit from said Eugene Allen of Superior Fast Freight a concession and rebate in the amount of two percent of the total freight bill revenues which Superior Fast Freight would receive in respect to any property to be tendered to it by Andrew Jergens Company at Burbank and Los Angeles, California, for transportation in interstate commerce, whereby the property of said Andrew Jergens Company would have been transported at a less rate and charge than that named in the applicable tariffs of Superior Fast Freight published and filed with the Interstate Commerce Commission.

4

COUNT TWO

(49 USC 41(1))

On or about February 12, 1962, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant JERRY BRAVERMAN, did knowingly solicit from said L. E. Hoppy and Marvin Pratt of Superior Fast Freight a concession and rebate in the

amount of two, one hundred dollar bills from Superior Fast Freight in respect to any property tendered to it after February 1, 1962, by Andrew Jergens Company at Burbank and Los Angeles, California, for transportation in interstate commerce, whereby the property of said Andrew Jergens Company would have been transported at a less rate and charge than that named in the applicable tariffs of Superior Fast Freight published and filed with the Interstate Commerce Commission.

The Grand Jury realleges paragraphs one, two, three and four of Count One.

5

COUNT THREE

(49 USC 41(1))

On or about February 21, 1962, in Los Angeles County, California, within the Central Division of the Southern District of California, the defendant JERRY BRAVERMAN did knowingly solicit from Robert C. Harmonson and L. E. Hoppy of Superior Fast Freight a concession and rebate in the amount of \$150 for every \$3,000 in freight revenues which said Superior Fast Freight received in respect to any property tendered it after February 1, 1962, by Andrew Jergens Company at Burbank and Los Angeles, California, for transportation in interstate commerce, whereby the property of said Andrew Jergens Company would have been transported at a less rate and charge than that named in the applicable tariffs of Superior Fast Freight published and filed with the Interstate Commerce Commission.

The Grand Jury realleges paragraphs one, two, three and four of Count One.

A TRUE BILL

DONALD H. PACKER
Foreman

FRANCIS C. WHELAN
Francis C. Whelan
United States Attorney

4

(File endorsement omitted)

6

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

No. 30912-CD

(Title omitted)

Trial Memorandum—Filed June 21, 1962

[49 USC 41(1): Unlawful Solicitation of Concession and Rebate Respecting the Transportation of Property in Interstate Commerce]

I

PRE-TRIAL STATEMENT AS TO THE STATUS OF THE CASE

- A. This case is scheduled for trial on Tuesday, June 26, 1962, at 9:30 A.M., before the Honorable Wm. C. Mathes;
- B. Estimated duration of trial is one day;
- C. The defendant is at liberty, no warrant having been issued;
- D. An interpreter will not be necessary;
- E. Jury has not been waived;
- F. The Indictment is in three counts, each alleging a solicitation of a rebate and concession by the defendant from Superior Fast Freight, a freight forwarder subject to the Interstate Commerce Act. The result of the solicitation would have been the transportation of property in interstate commerce at rates less than those filed and published with the Interstate Commerce Commission.
- G. *Quotation of the Statute Involved:*
 - 7 " . . . and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce

by any common carrier subject to said Chapter whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs . . ."

(49 U.S.C. § 41 (1), emphasis added).

H. *Elements of Each Offense:*

The solicitation of any rebate or concession by any person . . .

In respect to the transportation of any property in interstate transportation . . .

By any common carrier subject to the Interstate Commerce Act . . .

Whereby the property shall by any device be transported at a less rate than that named in the tariffs published with the Interstate Commission.

I. *Unusual Issues of Law*

1. *As to Evidentiary Questions:*

8 Extrajudicial statements, offered only to prove that the statements were made, and not to prove the truth of the assertion, are not subject to the hearsay rule, and are admissible. *N.L.R.B. v. Thomas Drayage and Rigging Co.* (C A 9th-1953), 206 F. 2d 857; *United States v. Mesarosh* (C A 3rd-1955), 223 F. 2d 449, reversed on other grounds, *Mesarosh v. United States* (1956), 352 U.S. 1; *U. S. v. Companaro* (D.C. Penn-1945), 63 F. Supp. 811; 6 *Wigmore on Evidence* (1940 Ed), §1766.

2. *As to substantive Law Questions:*

The language of the statute under which this action is brought is sufficiently broad to prohibit the alleged conduct of the defendant. (See § G of this memorandum, *supra*). And this is true even though the employer of a defendant so situated may not have known of or condoned that conduct, (*United States v. Miller*, (D.C. Neb. 1937), 18 F. Supp. 389. See also *Howitt v. United States*, (1945), 328 U.S. 189, and *Union Pacific Railroad Co. v. United States*,

(1940), 313 U.S. 450); and irrespective of whether or not the shipping company was to receive any advantage or discrimination in its favor as a result of the action by its employee.

While the cases decided under the Elkins Act have involved some advantage or discrimination in favor of the shipper, this is not a mandatory requirement of the Act. As stated by the Court in *United States v. Miller* (supra): "*The purpose of the statute [Elkins Act], is to protect the carrier, as well as the shipper.*" (Emphasis and brackets added, at p. 391).

9

In *Vandalia Railroad Co. v. United States*, (CA 7th-1915), 226 F. 713, the Court said: "The statute evidently aims to prohibit, not only discrimination as between shippers, but departure from the tariff rates, irrespective of its actual discriminatory effect." (p. 716). Under the plain wording of the statute, it can be said that "the statute evidently aims to prohibit, not only discrimination as between shippers, but departure from the tariff rates, irrespective of its actual discriminatory effect" or conference of an advantage on the shipper.

Also, the Court in the *Miller* case (supra), points out that the legislative history of the Elkins Act shows an intent to "put an end to interference with the even flow of interstate commerce on the part of any one, whether person or corporation. An essence of the offense is interference, aside from the gain or loss occasioned thereby." (pp. 390-391).

Section 1021(g) of Title 49 of the United States Code, makes freight forwarders subject to the Elkins Act.

II

PRE-TRIAL OPENING STATEMENT

The United States expects to prove all of the operative allegations contained in the indictment, including the following:

A. Defendant JERRY BRAVERMAN had authority over the shipment of merchandise from the Andrew Jergens Company, at all times relevant to this case.

B. On or about January 20, 1962, defendant BRAVERMAN orally solicited from an employee of Superior Fast Freight Company, a rebate or concession in respect to the interstate shipment of merchandise. The amount of this rebate or concession was expressed in the form of a percentage of the total freight revenues of merchandise placed with Superior Fast Freight Co., by the Jergens Company.

C. On or about February 12, 1962, defendant BRAVERMAN orally solicited from two employees of Superior Fast Freight Company, a rebate or concession in respect to the interstate shipment of merchandise by the Jergens Company. The amount of this rebate or concession was expressed in the form of "two bills" per month.

D. On or about February 21, 1962, defendant BRAVERMAN orally solicited from an officer and from an employee of Superior Fast Freight Company, a rebate or concession in respect to the interstate shipment of merchandise by the Jergens Company. The amount of this rebate or concession was expressed in the form of \$150 for every \$3,000 in freight revenues tendered by the Jergens Company.

E. At all times herein mentioned, Superior Fast Freight was a freight forwarder, and subject to the Interstate Commerce Act.

Respectfully submitted,

FRANCIS C. WHELAN
United States Attorney

THOMAS R. SHERIDAN
*Assistant U. S. Attorney
Chief, Criminal Section*

CHARLES M. GARY COOPER
Charles M. Gary Cooper
Assistant U. S. Attorney

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

No. 30,912 Criminal

(Title omitted)

PRESENT: HON. WM. M. BYRNE, District Judge;

Minute Order Rearrangement and Plea—June 18, 1962

PROCEEDINGS: For arraignment and plea. Indictment in three counts.

Defendant is arraigned and states his true name is as set forth in the Indictment, and pleads not guilty to each of the three counts.

COURT ORDERS this case transferred to Judge Mathes for all further proceedings.

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

No. 30,912 Criminal

U.S.A. vs. JERRY BRAVERMAN

PRESENT: HON. WM. C. MATHES, District Judge;

Minute Order Setting Cause for Jury Trial—June 18, 1962

PROCEEDINGS: For setting for jury trial.

Counsel make statements.

COURT ORDERS cause set for an estimated two days jury trial commencing June 26, 1962, 9:30 AM, and for call of the calendar on June 25, 1962, 1:30 PM, and defendant meantime remain on O/R.

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

No. 30,912 Criminal

(Title omitted)

PRESENT: HON. WM. C. MATHES, District Judge;

• • • • •

Minute Order Recall of the Calendar—June 25, 1962

PROCEEDINGS: For call of the calendar. Indictment in three counts.

Counsel estimate case will take one and one-half to two days to try by jury. COURT ORDERS cause set for jury trial June 26, 1962, 9:30 AM.

—

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

No. 30,912 Criminal

(Title omitted)

PRESENT: HON. WM. C. MATHES, District Judge;

• • • • •

Minute Order Re Dismissing Indictment—June 26, 1962

PROCEEDINGS: For jury trial. Indictment in three counts.

Court convenes at 10 AM. All present as shown.

All members of counsel, defendant, and the reporter approach the bench out of hearing of the prospective jurors. A general conference is had among counsel and Court. Legal citations are presented by both sides.

Counsel for Gov't having represented to the Court that the solicitations alleged in the Indictment were for the

personal benefit of defendant, and not for the benefit of the shipper by whom he was employed, the Court construes the Indictment as not alleging a public offense under the Federal Statute; and, upon motion by defendant, ORDERS the Indictment dismissed without prejudice to the prosecution of the defendant for an offense within the provisions of Title 49 USC, Sec. 41(1), if the plaintiff be so advised.

(File endorsement omitted)

16

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

No. 30912—Criminal

(Title omitted)

Reporter's Transcript of Proceedings—June 26, 1962

HONORABLE WILLIAM C. MATHES, JUDGE PRESIDING

17

Appearances

For the Plaintiff: FRANCIS C. WHELAN,
United States Attorney.
By: CHARLES M. GARY COOPER,
Assistant United States Attorney.
600 Federal Building,
Los Angeles, California.

For the Defendant: CHARLES L. LIPPITT,
14423 Hamlin Street,
Van Nuys, California.

18 LOS ANGELES, CALIFORNIA, TUESDAY, JUNE 26, 1962.
10:45 A.M.

Colloquy Between Court and Counsel

The Court: 30912, United States v. Jerry Braverman.

Mr. Lippitt: Ready for the defendant.

Mr. Cooper: Ready for the Government, your Honor.

The Court: I will ask counsel to approach the bench with the defendant.

(The following proceedings were had at the bench, out of the hearing of the jury venire, with counsel and the defendant present:)

The Court: Is it stipulated, gentlemen, these proceedings take place at the bench in the presence of the defendant, outside the hearing of the jury panel?

Mr. Lippitt: So stipulated.

Mr. Cooper: So stipulated.

The Court: What is the punishment for this offense? Is this a misdemeanor?

Mr. Cooper: There is a jail sentence, is my understanding of the statute, your Honor, up to 20 years, and there is either/or a fine.

The Court: The statute says:

"Every person or corporation, whether carrier or shipper, who shall, knowingly, offer,"

and so forth,

"solicits rebate . . . shall be deemed guilty of a
19 misdemeanor, and on conviction thereof shall be punished by a fine of not less than \$1,000 nor more than \$20,000: *Provided*, That any person, or any officer or director of any corporation subject to the provisions of sections 41, 42, or 43 of this title, or of chapter 1 of this title, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court."

Is this defendant in that category?

Mr. Cooper: Yes, sir.

The Court: Tell me where so I will know. Where does he fall, which one is he?

Mr. Cooper: He would be a person—

The Court: Of course, he is a person.

Mr. Cooper: —subject to the Act.

The Court: It doesn't say "subject to the Act". It says, "That any person, . . . subject to the provisions of sections 41, 42, or 43 of this title,—"

Mr. Cooper: Subject to 41(1) then.

The Court: "—or of this chapter 1 of this title".

20 Mr. Cooper: He is subject to Section 41(1). The previous clause would indicate the operative fact giving rise to the offense, starting with the words—

The Court: Do you expect to contend this is a felony?

Mr. Cooper: Yes, your Honor. The indictment has to be so broad—

The Court: I know, but I say, do you expect to prosecute it as a felony?

Mr. Cooper: Yes, we do.

Mr. Lippitt: Under the statute, Mr. Cooper?

Mr. Cooper: Under the statute.

Mr. Lippitt: I don't know under what theory. The statute calls it a misdemeanor.

The Court: Well, the statute also says, "That any person, . . . subject to the provisions of sections 41,—"

Is this 41?

Mr. Cooper: That is 41, your Honor, the Elkins Act.

The Court: "who shall be convicted as aforesaid, shall in addition—"

Of course, the fine is against the corporation, too, because of this provision down here in 41, subsection (2):

21 "In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, or shipper, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or shipper as well as that of the person."

So, of course, the fine would apply only to the corporation.

How do you say this defendant is subject to the provisions?

Mr. Cooper: May I get my copy of the Code from counsel table, your Honor?

The Court: Yes. As I read it, that doesn't mean this defendant, unless he is a carrier or a shipper that would be subject to the Act. Otherwise, there wouldn't be any

point in putting all that surplus language. All they need to say is, "Any person who violates ~~this~~—" All the rest of it would be surplusage. "Any person or any officer of a corporation subject to this Act". Who are subject to the Act?

Mr. Cooper: The shippers, carriers.

The Court: But he isn't a shipper.

Mr. Cooper: He is not, but I would read it that it is unlawful for any person to solicit,—

The Court: Certainly.

Mr. Cooper: —which is here alleged.

The Court: I have read that. Otherwise you
22' wouldn't be here.

He is not subject to the Act in the sense it is meant there. I will so rule. This is a misdemeanor unless you have some authority binding me.

Mr. Cooper: I have several cases.

The Court: All this man could be guilty of is solicitation.

Mr. Lippitt: At worst.

Mr. Cooper: With respect to "transportation of any property in interstate commerce"—

The Court: If you have any authority to the contrary,—

Mr. Cooper: There are no cases directly in point.

The Court: Then I have ruled that it is a misdemeanor.

Mr. Cooper: Then the case would proceed as a misdemeanor?

The Court: Yes.

Mr. Cooper: Under the statute?

The Court: Otherwise, if you prosecute as a felony, you would have to prove willfulness, specific intent. But, as I read it, there is no point in all that language there.
Mr. Cooper,—

Mr. Cooper: You are talking just about applicability of the jail sentence?

23 The Court: That is all I am talking about. Everybody is subject to the Act in the sense they can be guilty of a violation of the penal provisions. But when they say "subject to the Act", they mean subject as shipper or carrier to the Act.

Mr. Cooper: You mean it would have to be an officer of the shipping company?

The Court: No. It would have to be a person who is a carrier. A person can be a carrier, a person can be a shipper. Or it can be an officer or a director of any corporation that is a carrier or shipper.

Mr. Cooper: So it would either be a private shipper that would be subject to jail sentence or an officer of the offending corporation.

The Court: I take it there is no law against an individual being a common carrier.

Mr. Cooper: No.

The Court: Any individual can be a shipper. But any other person—that it is a misdemeanor, a person who is subject to the provisions of this Act, and apparently your contention would be any carrier or shipper would know that and would know this law and some other individual might not know the law.

Mr. Lippitt: Exactly. Our contention—

The Court: We must, unless the statute is clear. 24 rule it to be a misdemeanor. If it were not that way, then the statute would say, "Provided any person who violates this shall, in addition to the fine, be subject to imprisonment." That is all you need say, isn't it?

It isn't to be assumed that Congress put in all this language about:

"That any person, or any officer or director of any corporation subject to the provisions of sections 41, 42, or 43 of this title, or of chapter 1 of this title, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation,"

all that could be thrown out the window. All they would have to do is just say, "Any person that is convicted of a violation shall in addition", and then I would rule, if that were true, that Congress intended to make a person, guilty of a felony, because a corporation—a misdemeanor, because you can't put a corporation in jail.

Mr. Cooper: Could I ask a question, your Honor?

The Court: Yes.

Mr. Cooper: The sentence you are speaking of, "That any person, . . . of any corporation subject to the provisions of sections 41, 42, or 43," it is a person of a corporation subject to the Act.

The Court: No, no. "Every person or corporation,—"

25 Mr. Cooper: "any person, . . . of any corporation—"

The Court: "*Provided*, That any person, or any officer or director of any corporation—"

Mr. Cooper: It is disjunctive, your Honor.

The Court: Yes. "*Provided*, That any person, or any officer or director of any corporation subject to the provisions of sections 41, 42, or 43 of this title, or of chapter 1 of this title, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid—"

Mr. Cooper: Standing alone, "any person", then followed by a disjunctive clause completely.

The Court: Then why would all that be in there?

Mr. Cooper: To get both.

The Court: "Any person" would get it, wouldn't it?

Mr. Lippitt: Period.

The Court: Do you find any other criminal statute that says, "any person and or any officer, director"?

Mr. Cooper: Why do they put it in the disjunctive, your Honor, "or any officer or director of any corporation"?

The Court: Because a person, as I have just said—now, we get into the habit of thinking only corporations can be such and such. People get into the habit of thinking
 26 only corporations can be a carrier. Individuals can be carriers, individuals or shippers—I assume individuals or carriers, and they are subject to the Act, presumably know the statute, know the law, and if they do it they are guilty of a felony. But if just an ordinary John Doe does it, he could come in and say, "I didn't know it was against the law to solicit." Then you would have to convict him of a misdemeanor at worst, in any event. That is the way I would rule, Mr. Cooper. I don't know whether that changes your view of the situation or not.

Mr. Lippitt: Well, our contention, of course, in the entire proceedings, your Honor, is that the indictment as charged does not come within the purview of this statute.

We have quashed one indictment in this matter and I did not make another motion to quash this, feeling I would just as soon go to trial and put an end to this, and make

my motion to dismiss at the end of the Government's case, because I don't think if they proved all of this, then this would still come within the purview of the statute, reading it as you do and as I do.

The statute is quite clear, and I would like to point out to your Honor that there is no comma between—

The Court: No comma between what?

Mr. Lippitt: In the statute itself, if the court please, that no person shall solicit, so on and so forth, and there is no comma which would in any way cause a discrimination, et cetera. In other words, they tie it together, but I can't see how the Government can in any way prove—

The Court: "it shall be unlawful for any person. . . . to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to this chapter whereby—"

there is no comma there.

Mr. Cooper: "whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier."

The Court: Wasn't this property transferred?

Mr. Lippitt: Nothing was done, there wasn't even a solicitation, or acceptance of the solicitation.

Mr. Cooper: There was a solicitation that would look forward to a future shipment at lower cost than the rate published.

Mr. Lippitt: There is no law in the law books—I don't think Congress intended—I think they threw these words in as surplusage. They tied it in with the factual receiving of a rebate.

28 The Court: Solicit a rebate, which would have that effect.

Mr. Cooper: "whereby any such property shall by any device whatever be transported".

The Court: You would have to prove that the effect of the rebate would be to transport this property at less than the tariff. That is what it amounts to. Can you do that?

Mr. Cooper: Your Honor, we would submit that would follow as a matter of law.

The Court: Oh, no, no. For instance, if this man, working for the Jergens Company, and he is pocketing this, he is soliciting some for himself and not for the Jergens Company, then the property wouldn't be transported at any less rate.

Mr. Cooper: From the carrier's standpoint it certainly would be. The money is being deprived the carrier. Therefore, they are not transporting it at the published rate.

Mr. Lippitt: They are getting their full rate.

Mr. Cooper: No, they are not.

The Court: They are getting their full rate and giving it back to this man.

Mr. Cooper: Your Honor, the cases are very broad on this. "by any device whatever".

The Court: I understand.

Mr. Cooper: That has this effect—

The Court: That is right.

29 Mr. Cooper: —of not getting full payment by the carrier.

The Court: I understand, but if the shipper gets it, it is less than the rate, but the carrier gets the money. He doesn't rebate it to the shipper, does he?

Mr. Cooper: It is lost. It is rebated to somebody and the effect is that the property was transported at a lesser rate.

Mr. Lippitt: If you followed your theory, Mr. Cooper, any money they spent for advertising, any money they spent to purchase a gift for any traffic manager or anybody employed by a shipper, then this law would be in effect and there would be tremendous and numerous prosecutions.

This is our theory of the case, your Honor, that the shipper paid no less than—and at no time would the shipper have received any benefit from this, if proven as true.

We have another theory in this case, but this is our principal legal contention here.

The Court: What would you say if it were an advertising concern, like Foster and Kleiser, and they say, "We give you our business of transporting our billboards—" rather, we will take it away from Red Ball Express and

give it to Black Ball Express, provided Black Ball Express will take a billboard. Would that be rebate?

30 Mr. Cooper: I don't think that would logically fall under the intention Congress had.

The Court: Why wouldn't it?

Mr. Cooper: For something like this?

The Court: A billboard would cost more than \$150.00 out of \$3,000.00.

Mr. Cooper: This is not legitimate advertising you are talking about spent by the company.

The Court: It is legitimate advertising, it is a concession.

Mr. Cooper: If it is a concession for shipment or placement of goods, if it is, then it falls under the cases.

The Court: A rebate means a concession to the shipper, doesn't it?

Mr. Cooper: Concession would certainly—not necessarily limited to the shipper. Concession could be rebate to anyone.

The Court: Would that be a violation of the statute?

Mr. Cooper: This advertising?

The Court: Yes.

Mr. Cooper: If it was done to procure the business of placement, yes, it would, because there is a Supreme Court case—I have the citation in my portfolio—where a railroad was trying to interest merchants to place their mar-
31 kets alongside the railroad yard, and they got the city to start offering these people money to put their markets alongside the railroad yard. They advertised this, that and the other thing, and they held there was rebate or concession.

Mr. Lippitt: But they had already done—they had already built a warehousing place and already leased it. That is the difference, they had already done these things, and it was between carriers and shippers. It didn't involve the city in that.

The Court: That makes all the difference in the world.

Mr. Lippitt: Every case you cited is between carriers and shippers.

The Court: If the carrier gets from the shipper the full amount of the tariff, the fact that the carrier might kick back some of it to some individual, would that be a violation of the statute?

Mr. Cooper: I think it would, your Honor, because it would have the effect of transporting at less than the published rates.

May I get my cases I have to support my theory?

The Court: Yes, I would like to see them.

Mr. Lippitt: May I be excused to get my file, if the court please?

32 The Court: Yes.

Mr. Cooper: One case I was looking for, your Honor, is *Vandalia Railroad Co. v. United States*, for example, cited on page 3.

The Court: That is a Seventh Circuit case?

Mr. Cooper: Yes. 226 F. 713. The court said:

"The statute evidently aims to prohibit, not only discrimination as between shippers, but departure from the tariff rates, irrespective of its actual discriminatory effect."

Mr. Lippitt: Finish reading it. "or conference of an advantage on the shipper", which is not true in this case, even if you prove what you said.

May I point out something to the court?

The Court: Yes.

Mr. Lippitt: In 1955, in *United States v. General Motors Corporation*, 226 F. 2d 745—

The Court: 226—

Mr. Lippitt: F. 2d 745. The court said, and this is also the headnote 3:—

The Court: Is this a case under prosecution under this Act?

Mr. Lippitt: Yes, it is, your Honor. The court said in headnote No. 3, which is taken bodily from the opinion:

"The crux of the prohibition in the Elkins Act—"

33 this is the Act we are talking about,

"—against rebates is receipt of an advantage by shipper and receipt of advantage is to be tested by actual result, not by intention. Elkins Act, Sec. 1(3) as amended 49 USCA Sec. 41(3)."

That is what we are talking about here, which this affirmed in previous language in 313 U.S. 450.

I think the prime case is the General Motors case here in 1955. The court at that time recognized the distinction we are trying to make here.

In no case in the case books, if the court please, is there a case on solicitation pure and simple.

Mr. Cooper: Your Honor, we submit this is a normal factual situation, but we also submit that the statute is broad enough to cover this. Merely because there is no case in point—

The Court: Are you suggesting as long as this statute has been on the books that this is the first time that an employee of the shipper ever solicited a rebate or got a rebate?

Mr. Cooper: No. There are no cases. It may be the first time it was ever prosecuted.

The Court: Why would that be? This is Judge 34 Leahy's case. Judge Leahy is reversed.

Mr. Lippitt: On another ground, your Honor.

The Court: Do you expect to prove that this was solicited on behalf of the Jergens Company?

Mr. Cooper: No, your Honor, strictly on behalf of the defendant.

The Court: As an individual?

Mr. Cooper: That is right, your Honor. May I cite one case to you?

The Court: Yes.

Mr. Cooper: It is an early case. United States v. Miller, 18 Fed. Supp. 388. I have the case right here. It is a little marked up.

The Court: Very well.

Mr. Cooper: It is a short case.

The Court: Well, this is a question of whether it applies to carrier-shipper or whether it applies to some outside person.

Mr. Cooper: That is right.

The Court: I already ruled it applies to this defendant. He can be guilty of it, but, as I read this, U. S. v. Miller, 18 Fed. Supp., as far as I have read, the charge was that the shipper was charged a minimum rate for the livestock, whereas he should have been charged the actual weight of the livestock.

35 Mr. Cooper: That is right.

The Court: Who got the benefit of the rebate, the shipper?

Mr. Cooper: The person who pocketed it was the book-keeper.

The Court: He may have stolen it from the shipper after the shipper got it. He might have stolen it then.

Mr. Cooper: You are saying there has to be an advantage to the shipper of some kind? I agree that the cases do have—

The Court: Mr. Cooper, suppose some shipper here in Los Angeles shipped something to get a rebate back and some robber goes in tonight and robs the safe, you wouldn't say the robber was guilty of taking the rebate, would you?

Mr. Cooper: No, your Honor. I believe the shipper, as far as he knew, was paying the minimum rate and that the bookkeeper took the money, took the difference.

The Court: So they prosecuted the bookkeeper and he was guilty. There is no question about it.

Mr. Cooper: That is right. But the shipper didn't receive any lower rate.

The Court: If this man had solicited that rebate for Jergens there wouldn't be any question about it, either.

Mr. Cooper: Your Honor, in the Miller case the shipper paid as far as it was concerned the higher rate.

36 The Court: Wait a minute, now.

Mr. Lippitt: No, no.

The Court: Wait a minute.

Mr. Cooper: It was paying the full rate, as far as it knew.

The Court: So it wasn't guilty of a criminal act. The shipper was not guilty of knowingly accepting a rebate, was he, but, in truth and in fact, it was accepting a rebate unwittingly.

Mr. Cooper: I don't think so.

The Court: Listen to the indictment.

"That the defendants, well knowing the facts alleged in the indictment, unlawfully and knowingly received a rebate in respect to the aforesaid transportation of the aforesaid property of the difference between the true weight of the shipment and the minimum weight provided under the schedules and tariffs of rates."

Mr. Cooper: All right.

The Court: In other words, here is a company, namely, the Robert Bros. & Rose Live Stock Commission Company, shipping cattle and through this conspiracy they were being charged the minimum tariff, whereas they should have

been charged the tariff according to the true weight of the cattle.

I haven't read far enough to know how these defendants got away with the money. How did they?

Mr. Cooper: How could they, unless by some—

The Court: They couldn't unless they robbed Robert Bros.

Mr. Lippitt: They falsified the records.

Mr. Cooper: Right. By some bookkeeping entry.

Mr. Lippitt: I believe that was why the bookkeeper was involved.

The Court: (Reading)

"By the twenty-first count of the indictment, the defendants are charged with conspiracy",

and so forth.

"These acts, as charged, in substance consist of: (a) Placing false weight figures upon the freight bills by the defendant Phil Miller; (b) making and writing of the checks by the defendant Phil Miller payable to the defendant Frank Sargent, from funds of Robert Bros. & Rose Live Stock Commission Company; (c) the appropriation for his own use of moneys obtained on these checks by the defendant Frank Sargent; (d) the placing of false weight figures upon the freight bills by the defendant Francis B. Hearty, covering the carload shipments."

Well, I suppose on the books of Robert Bros. & Rose Live Stock the full amount was debited as an expense.

38 Mr. Lippitt: But actually not paid.

Mr. Cooper: But the minimum went to the railroad. The difference went to the bookkeeper—

Mr. Lippitt: That is the difference.

Mr. Cooper: —by a bookkeeping entry.

The Court: But the goods were transported—

Mr. Cooper: At a full rate, so far as the shipper was concerned; he paid.

The Court: No, no. Later on he paid. But at the time he paid only the minimum rate.

Mr. Cooper: How could the bookkeeper get the money?

The Court: The carrier, the carrier got the minimum rate.

Mr. Cooper: Right. But the charge to the company was the full amount and the bookkeeper merely took the difference.

The Court: Here the carrier was to get the full rate—

Mr. Cooper: That is right.

The Court: —and kick it back to this defendant, according to your theory.

Mr. Cooper: That is right.

The Court: If this defendant had been acting for Jergens, even though he later embezzled the money from Jergens—

Mr. Cooper: Then you think it would fall under
39 this case?

The Court: I think it would clearly be in violation of the statute. But the statute is designed to assure equal treatment to the shipper.

Mr. Cooper: I agree with that.

The Court: The fact that this man was dishonest with his employer would be a state offense, but not federal.

Mr. Cooper: May I ask, do you feel that Congress intended—granted that the legislative intent was to prevent discrimination in favor of some shippers over others, do you think that Congress intended that, merely because the Government cannot prove that the shipper was in on it, that this would be outside the scope of the legislative intent here?

It is hard telling what kind of clandestine agreement you could have between an employee who is way down the line, who is doing this, and the shipper, merely because you can't prove it.

The Court: I know it.

Mr. Cooper: Does this fall without the purview of the statute?

Mr. Lippitt: I think the distinction is the advantage to the shipper.

The Court: Of course, you could prove it by circumstantial evidence. I don't know what the circumstances
40 are here, but you say your theory is that this defendant was going to pocket it himself.

Mr. Cooper: Yes, that is the evidence we have.

The Court: But supposing he wasn't, does that mean that the Government has no case? If he weren't and you

proceeded to trial on that theory and asked the jury to believe from circumstantial evidence he was doing this at the instance of his employer, I would say yes, there is clearly an offense.

Mr. Cooper: I am just saying, don't you feel that Congress would intend there should be some way to nip this thing in the bud without having to prove the shipper knew about it? There may be times when it would be impossible to prove it and yet it may take place.

The Court: It has to be whereby the shipper would—there has to be an advantage. There is no advantage here.

Mr. Cooper: You feel you have to prove that under the statute there is an advantage?

The Court: It has to be that situation in order to be a discrimination as between shippers. That is what it is designed to protect, the kickback, the rebate, and so forth, to certain favored shippers.

Mr. Cooper: You don't feel to prevent that you could bring an action against an employee without showing the shipper was in on it?

The Court: Congress could say, "Any employee of
41 a common carrier, any common carrier, any employee or agent or representative of a common carrier, who solicits a rebate shall be guilty of an offense." Yes, Congress can say that, with respect to interstate shipments. Congress hasn't said it. This is a very cumbersome statute.

Mr. Lippitt: Very.

The Court: When I read your cases, it is designed, I am convinced, to apply only in a case whereby any advantage or discrimination is practiced in favor of the shipper; the shipper.

Mr. Cooper: You don't think that—

The Court: It doesn't say that. You see, no one could pay this to this man, this freight forwarder or shipper or carrier couldn't pay this without embezzling it, really, from the carrier. No one could lawfully pay it, could lawfully give it to him. Any man that took that out of the treasury of this carrier and paid it to this defendant would be embezzling it in law.

Mr. Cooper: Definitely.

The Court: I don't care what his position is with the company.

Mr. Cooper: Definitely. The violation is at either end, the carrier's end or the shipper's end.

The Court: Congress could say, if it wanted to, that anybody who embezzles funds from a common carrier
42 engaged in interstate commerce would be guilty of a federal offense, but they have never said that.

Mr. Cooper: The embezzlement wouldn't apply to someone in the defendant's position.

The Court: It could say that any employee of any shipper or any agent of any shipper who solicits a rebate—

Mr. Lippitt: For his personal use.

The Court: —shall be guilty of an offense, whether for the benefit of the shipper or otherwise shall be guilty of an offense. But they haven't said that. They just haven't said it, that is all.

Now, I suppose they intended to leave it to the carrier to take care of the man. If he is guilty, which you say he is, to leave it to the Jergens Company to take care of him, to keep their skirts clean, because you could come into court and prosecute this man on the theory that the circumstantial evidence would convince the jury he was doing it for the carrier and if the jury were convinced from circumstantial evidence that he was—

Mr. Cooper: I understand your line of reasoning, your Honor.

The Court: —guilty of the offense because the carrier would be getting the discrimination.

Mr. Cooper: I see.

The Court: But if he is merely trying to make a
43 little money on the side out of the carrier, which the carrier could not lawfully pay, he could not lawfully receive, could he?

Mr. Cooper: No.

The Court: I assume he couldn't lawfully receive it. Under state statute it is a bribe, is what it amounts to.

Mr. Cooper: That is what it would be under state law.

The Court: We must remember these are federal statutes. They have to be strictly construed. This is the type of offense normally state law would punish.

Mr. Cooper: Yes.

Mr. Lippitt: I will stipulate to a dismissal, Mr. Cooper.

Mr. Cooper: Well, the effect of a dismissal then would

be without prejudice to any later stating of an offense under the statute?

The Court: Yes. That only refers to this offense.

Mr. Cooper: I see.

The Court: I will order it dismissed.

Mr. Lippitt: Thank you, your Honor.

Mr. Cooper: That is the court's order.

The Court: I will order it dismissed upon the ground the United States Attorney's statement of what he expects to prove, that the indictment does not state an offense
44 as construed by the United States Attorney.

If you want to you can prepare an order to that effect or the clerk can just enter a minute order.

Mr. Lippitt: I think a minute order will be sufficient.

The Court: State in the minutes that the United States Attorney, having represented to the court that the alleged solicitation was for the personal benefit of the defendant and not for the benefit of the shipper by whom he was employed, the court construes the indictment as not alleging a public offense under the federal statute, and upon motion by defendant orders the indictment dismissed without prejudice to the prosecution of the defendant for an offense within the provisions of 49 U.S.C. Section 41(1) if the plaintiff be so advised; plaintiff being the Government.

Mr. Cooper: A different offense would include an offense under 41(1) if we had the operative facts?

The Court: Yes, that is right.

Is there bail here?

Mr. Lippitt: No bail; OR, your Honor.

The Court: Very well. The defendant is discharged.

(Whereupon, at 11:25 o'clock a.m., Tuesday, June 26, 1962, an adjournment was taken.)

45 (Reporter's certificate to foregoing transcript omitted in printing)

(File endorsement omitted)

46

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

No. 30912-CD

(Title omitted)

**Notice of Appeal to the Supreme Court of the United States—
Filed July 26, 1962**

I

Notice is hereby given that the United States appeals to the Supreme Court of the United States from the order of June 26, 1962, dismissing the three-count Indictment which charged a violation of 49 U.S.C. § 41(1) for knowingly soliciting a concession and rebate in respect to the transportation of property in interstate commerce by a common carrier, whereby such property would be transported at a less rate and charge than that named in the tariffs published and filed by such carrier with the Interstate Commerce Commission.

The appeal is taken pursuant to 18 U.S.C. § 3731.

II

The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. The Indictment.
- 47 2. All minute orders.
3. The trial memorandum of the United States, filed June 21, 1962.
4. The order of dismissal announced in Court on June 26, 1962.
5. The reporter's transcript of all proceedings on June 26, 1962.

III

The following question is presented by this appeal:

Whether in order to state an offense under 49 U.S.C. § 41(1) against a shipping clerk (employed by an inter-

state shipper) for soliciting a concession and rebate in respect to the transportation of property in interstate commerce, it is necessary to allege and prove that some advantage or discrimination would accrue in favor of the shipper, should the concession or rebate be granted.

Respectfully submitted,

FRANCIS C. WHELAN
United States Attorney

THOMAS R. SHERIDAN
*Assistant U. S. Attorney
Chief, Criminal Section*

CHARLES M. GARY COOPER
Charles M. Gary Cooper
*Assistant U. S. Attorney
Attorneys for Plaintiff
United States of America*

48 (Proof of service omitted in printing)

52 (Clerk's Certificate to foregoing transcript omitted in printing)

53 SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 506

UNITED STATES, *Appellant*,

vs.

of JERRY BRAVERMAN

Order Noting Probable Jurisdiction—December 17, 1962

APPEAL from the United States District Court for the Southern District of California.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is placed on the summary calendar.